Supreme Court, U.S.
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No. 97-965

In the Supreme Court of the United States

OCTOBER TERM, 1997

J. C. HERBERT BRYANT, JR., PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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14 pp

QUESTIONS PRESENTED

1. Whether a Special Deputy U.S. Marshal is an "officer or employee acting under the authority of the United States" within the meaning of 18 U.S.C. 912.

2. Whether the evidence at trial was sufficient to sustain petitioner's convictions.

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OPINION BELOW

The opinion of the court of appeals (Pet. App. 1a-18a[1]) is reported at 117 F.3d 1464.

JURISDICTION

The judgment of the court of appeals was entered on July 8, 1997. A petition for rehearing was denied on September 15, 1997. The petition for a writ of certiorari was filed on December 10, 1997. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a bench trial in the United States District Court for the District of Columbia, petitioner

[1] We have renumbered the pages of petitioner's appendix to run consecutively.

was convicted on one count of impersonating a federal officer, in violation of 18 U.S.C. 912, and one count of making a false statement in a matter within the jurisdiction of an agency of the United States, in violation of 18 U.S.C. 1001 (1988). He was sentenced to six months' imprisonment, to be followed by two years' supervised release, and was fined $5,000.

1. On September 2, 1992, petitioner, a Virginia resident, parked his blue Chevrolet Suburban truck near the entrance to the Mayflower Hotel in Washington, D.C. At the time, an Israeli diplomatic delegation was staying at the Mayflower. Before petitioner went inside the hotel, he placed a placard with the words "United States Marshal" on the dashboard near the truck's front window. Israeli diplomatic security agents examined petitioner's parked truck and saw, in plain view, six firearms and miliary-type gear in the rear cargo compartment of the truck. The Israeli security agents immediately contacted agents of the Department of State's Diplomatic Security Service (DSS), which was providing security for the Israeli delegation. Shortly thereafter, two DSS agents arrived and confirmed that firearms were visible in the rear cargo compartment of petitioner's truck. The agents also noted that the truck had police lights hidden behind the front grille and Mississippi license plates. While the DSS agents attempted to ascertain who owned the vehicle, two officers from the Metropolitan Police Department of the District of Columbia (MPD) arrived on the scene. Pet. App. 2a-3a; Gov't C.A. Br. 3-4.

Shortly afterwards, petitioner emerged from the hotel and approached the truck. One of the MPD officers asked whether petitioner was with the U.S. Marshals Service, and petitioner replied that he was.

Petitioner told one of the DSS agents, Mark Conord, that he was a "Special Deputy U.S. Marshal." When asked for his credentials, petitioner said that he had left his Marshals Service credentials at home, and he produced a badge and a card identifying himself as a deputy sheriff for Warren County, Mississippi. Petitioner stated that the firearms were in his truck because he had been target-shooting at a firing range the previous day. Pet. App. 3a; Gov't C.A. Br. 4-5, 7-8.

The MPD officers called the U.S. Marshal's office to clarify petitioner's status, and Supervisory Deputy Marshal Robert Williamson went to the scene. Petitioner told Williamson that he was a Special Deputy Marshal but had left his credentials at home. Petitioner also said that he knew the U.S. Marshal for the District of Columbia, Herbert M. Rutherford, III. Williamson contacted Rutherford, who had been trying unsuccessfully to find out petitioner's official status from the Marshals Service's national headquarters, on the telephone. At Rutherford's request, the MPD officers agreed to release petitioner to the Marshals Service. Williamson drove petitioner to Rutherford's office at the courthouse, and another deputy drove petitioner's truck there. After a brief interview, Rutherford released petitioner and his truck, but the Marshals Service retained the firearms. Pet. App. 3a; Gov't C.A. Br. 5-6.

2. a. Petitioner was charged with pretending to be an officer acting under the authority of the United States (a Special Deputy United States Marshal) in order to obtain something of value (to be not arrested by the MPD for unlawful possession of a firearm), in violation of 18 U.S.C. 912, and one count of making a false statement in a matter within the jurisdiction of an agency of the United States, in violation of 18

U.S.C. 1001 (1988).[2] At trial, the Director of the Marshals Service at the time of the incident, Henry Hudson, testified that he knew petitioner, and that petitioner had been a Special Deputy Marshal for six or seven years because of his work with the Marshal's Foundation, a non-profit organization that assists the families of slain deputies. Hudson further testified that petitioner's special deputization had expired on June 30, 1992, and that petitioner had not been reappointed. Pet. App. 3a-4a; Gov't C.A. Br. 7. Petitioner also testified in his own defense at trial. He claimed that he did not tell any of the law enforcement agents on September 2, 1992, that he was a Special Deputy Marshal. Pet. App. 5a; Gov't C.A. Br. 8-9.

b. The district court found petitioner guilty. The court "specifically f[ound] that [petitioner] claimed to be a Special Deputy United States Marshal during the course of his conversations with the law enforcement officials on the scene." Pet. App. 5a (citing trial transcript). The court "credit[ed] the clear, firm and unequivocal testimony of [DSS] Special Agent Conord" and "the clear and unequivocal testimony of Supervisory Deputy Marshal Wiliamson." *Ibid.* The court expressly rejected petitioner's "self-serving testimony that he never said he was a Special Deputy US Marshal." *Ibid.*

3. The court of appeals affirmed. Pet. App. 1a-18a. The court rejected petitioner's claim that the evidence at trial was insufficient to sustain his convictions because it did not establish that he had

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[2] Petitioner was also charged with one count of carrying a pistol without a license, in violation of D.C. Code § 22-3204(a). The district court acquitted him of that charge. See Pet. C.A. App. 101.

represented on September 2, 1992, that he was a Special Deputy Marshal. *Id.* at 5a-6a. "Deferring to the district judge's credibility determinations," the court explained, "we must uphold his verdict because the testimony of Conord and Williamson * * * suffices to persuade a reasonable person to find beyond a reasonable doubt that [petitioner] falsely identified himself as a special deputy marshal on September 2, 1992." *Id.* at 6a.

The court likewise rejected petitioner's claim that the evidence was insufficient to sustain his conviction for impersonating a federal officer because it did not establish that he had demanded or obtained any thing of value while misrepresenting himself as a Special Deputy Marshal. Pet. App. 6a-7a. The court concluded that the evidence was "sufficient to permit a reasonable person to find, at least inferentially, that [petitioner] misrepresented his status in order to avoid arrest." *Id.* at 7a.

Judge Silberman concurred. Pet. App. 10a-16a. Although he was "left with the strong impression that appellant should not have been prosecuted, let alone convicted," *id.* at 10a, he concluded that he was "powerless, given the scope of review of a district judge's factual findings, from seeking to rectify" what he termed "this gross injustice." *Id.* at 16a.

Judge Henderson, who wrote the majority opinion, also wrote a separate concurring opinion. Pet. App. 17a-18a. She stated that she "share[d] the concerns expressed in Judge Silberman's concurring opinion and agree[d] that, given the circumstances, [petitioner] should not have been prosecuted or convicted." *Id.* at 17a. In addition, Judge Henderson "believe[d] that a special deputy United States marshal is not an 'officer or employee of the United States' the imper-

sonation of which is proscribed by 18 U.S.C. § 912." *Ibid.* In her view, the Director of the Marshals Service "has no statutory authority to appoint anyone other than a Marshals Service employee or official as an 'officer' of any kind." *Ibid.* (footnote omitted). Judge Henderson, however, felt "constrained to join in affirming [petitioner's] conviction [for impersonating a federal officer] because circuit precedent holds that the statute can be violated even when the assumed office does not exist." *Id.* at 18a.

ARGUMENT

1. Petitioner contends (Pet. 9-16) that his conviction for impersonating a federal officer under 18 U.S.C. 912 should be reversed because a Special Deputy United States Marshal is not an "officer or employee" of the United States within the meaning of Section 912.[3] That argument is without merit. Section 912 provides:

> Whoever falsely assumes or pretends to be an officer or employee acting under the authority of the United States or any department, agency or

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[3] In his opening brief in the court of appeals, petitioner did not advance the argument that a Special Deputy U.S. Marshal is not an officer or employee of the United States. See Pet. C.A. Br. 14-35. On May 9, 1997, after oral argument, the court of appeals directed the parties to address the issue in supplemental briefs. See Gov't Supp. C.A. Br. 1. Although Judge Henderson discussed the issue in her separate concurring opinion, the panel of the court of appeals did not discuss it in the majority opinion. Consequently, the issue was neither pressed by petitioner nor passed on by the court below, and the claim is not properly raised here. Cf. *Berkemer* v. *McCarty*, 468 U.S. 420, 443 (1984); *United States* v. *Lovasco*, 431 U.S. 783, 788 n.7 (1977); *Adickes* v. *S.H. Kress & Co.*, 398 U.S. 144, 147 n.2 (1970).

> officer thereof, and acts as such, or in such pretended character demands or obtains any money, paper, document, or thing of value, shall be [punished according to law].

A duly appointed Special Deputy Marshal is clearly an "officer or employee acting under the authority of the United States" for purposes of Section 912. Pursuant to 28 U.S.C. 509 and 510, the Attorney General has delegated to the Director of the Marshals Service the authority to deputize "[s]elected federal, state, or local law enforcement officers whenever the law enforcement needs of the U.S. Marshals Service" require the use of such officers to perform the functions of a Deputy U.S. Marshal. 28 C.F.R. 0.112. Because a Special Deputy Marshal is authorized to perform the federal functions of a Deputy Marshal as a result of his deputization, a local law enforcement official selected as a Special Deputy U.S. Marshal is "acting under the authority of the United States" within the meaning of Section 912.[4] Cf. *Lamar* v. *United States*, 241 U.S. 103, 112-113 (1916) (holding, based on the "nature and character of their duties and responsibilities," that Members of the House of Representatives are "officers" under the predecessor provision to Section 912, and that one who impersonates a Member is covered by statute); *United States* v. *Diamond*,

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[4] Petitioner errs in relying on various indications in administrative practice that Special Deputy Marshals are not employed by the United States, in the sense that the positions are not covered by federal employment statutes and regulations. Pet. 11-13. The statute at issue, however, does not reach just those who claim to hold positions actually covered by federal employment regulations; it reaches all those who falsely claim to be acting with federal authority.

53 F.3d 249, 251-252 (9th Cir.) (assault on Special Deputy U.S. Marshal covered by 18 U.S.C. 111, prohibiting assaults on any federal officer, including, by incorporation of 18 U.S.C. 1114, "any United States marshal or deputy marshal"), cert. denied, 116 S. Ct. 326 (1995).

Furthermore, in *United States* v. *Barnow*, 239 U.S. 74, 78 (1915), this Court made clear that the nonexistence of a federal office that an impersonator pretends to hold was not a defense under the predecessor provision to Section 912:

> It is the false pretense of Federal authority that is the mischief to be cured; of course, only when accompanied with fraudulent intent, but such a pretense would rarely be made for benevolent purposes. Now, the mischief is much the same, and the power of Congress to prevent it is quite the same, whether the pretender names an existing or a non-existing office or officer, or, on the other hand, does not particularize with respect to the office that he assumes to hold.

The courts of appeals have reached the same conclusion under Section 912. See *United States* v. *Maxwell*, 920 F.2d 1028, 1036-1037 & n.11 (D.C. Cir. 1990) (conviction for pretending to be "'Special Consultant' to the United States Department of the Treasury"); *United States* v. *Rosser*, 528 F.2d 652, 656 n.14 (D.C. Cir. 1976) (defendant purported to be employee of IRS); *Caruso* v. *United States*, 414 F.2d 225, 226-227 (5th Cir. 1969) (defendant purported to be non-existent Administrator of Veterans Hospital). In this case, petitioner pretended to be an officer acting under the authority of the United States when he claimed that he was a Special Deputy Marshal after his special

deputization had expired. Accordingly, petitioner's conviction under Section 912 is valid, whether or not a duly appointed Special Deputy Marshal is, in fact, an officer or employee acting under the authority of the United States.[5]

2. Petitioner also contends (Pet. 16-17) that "[t]here was no convincing evidence upon which a guilty verdict could be based" because "[c]onflicting testimony, questionable memory, bias and concern about an alleged 'cover-up' abounded [among the witnesses at trial]." That contention, however, raises only a fact-bound claim that the lower courts erred in finding sufficient evidence to convict petitioner, and such a claim does not warrant review by this Court. The Court has emphasized that "[t]he primary responsibility for reviewing the sufficiency of the evidence to support a criminal conviction rests with the Court of Appeals." *Hamling* v. *United States*, 418 U.S. 87, 124 (1974). Moreover, this Court has made clear that it is not the role of an appellate court "to weigh the evidence or to determine the credibility of witnesses." *Glasser* v. *United States*, 315 U.S. 60, 80 (1942). Rather, an appellate court must affirm a criminal conviction as long as, "after viewing the evidence in the light most favorable to the prosecution, *any* rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." *Jackson* v. *Virginia*, 443 U.S. 307, 319 (1979);

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[5] This Court's decision in *Pierce* v. *United States*, 314 U.S. 306 (1941), on which petitioner relies (Pet. 10) is not to the contrary. In that case, the Court merely held that the predecessor provision to Section 912 did not reach the impersonation of officers or employees of a government corporation, in that case the Tennessee Valley Authority. 314 U.S. at 310-311.

see also *Burks* v. *United States*, 437 U.S. 1, 17 (1978). Applying that well settled standard of review, the court of appeals correctly concluded in this case that the evidence at trial was sufficient to sustain petitioner's convictions on both counts. Petitioner's fact-specific claim to the contrary raises no important issue of federal law warranting review by this Court.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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